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Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-889

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT, TOM RODEN, and PINKIE'S, INC.,
Petitioners

v.

EDGAR E. WHITWORTH
d/b/a DINKIE'S FOOD MART,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS

The most recent opinion of the United States Court of Appeals for the Fifth Circuit (Appendix "A") is reported at 576 F.2d 696. That opinion followed this Court's order of April 24, 1978 (Appendix "B") remanding this action to the court of appeals. The earlier opinion of the United States Court of Appeals for the Fifth Circuit (Appendix "C") is reported at 559 F.2d 378. The opinion of the United States District Court for the Northern District of Texas (Appendix "D") is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1978. The court of appeals denied the Petitioners' Petition for Rehearing and Petition for Rehearing En Banc on September 5, 1978. This petition is filed within 90 days of September 5, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

QUESTION ONE: WHETHER THE SHERMAN ACT IS APPLICABLE TO A CITY'S OTHERWISE VALID EXERCISE OF ITS ZONING AUTHORITY, WHERE THE MANNER IN WHICH IT IS EXERCISED IS CONTEMPLATED BY STATE STATUTE AND WHERE THE RESULT COMPLAINED OF BY RESPONDENT IS AUTHORIZED BY STATE STATUTE?

QUESTION TWO: WHETHER A PRIVATE PLAINTIFF HAS STANDING UNDER THE ANTITRUST LAWS TO CHALLENGE A CITY'S OTHERWISE VALID ZONING ORDINANCE WHEN THE BUSINESS WHICH WAS ALLEGEDLY INJURED COULD NOT COME INTO EXISTENCE BY REASON OF STATE LAW AND THE ORDINANCE AND WHEN THE LOCATION FOR WHICH THE BUSINESS IS SOUGHT WAS ZONED RESIDENTIAL BEFORE ITS PURCHASE BY PLAINTIFF?

STATUTES INVOLVED

This case involves consideration of the following statutes (the texts of which are set forth in Appendix E): Section 1 of the Sherman Act, 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1; Section 4 of the Clayton Act, 38 STAT. 730 (1914), as amended, 15 U.S.C. § 15; Section 16 of the Clayton Act, 39 STAT. 737 (1914), as amended, 15 U.S.C. § 26; TEX. REV. CIV. STAT. ANN. art. 1011a; The Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Arts. 666-4(a), 666-24, 666-54, 667-10-1/2 (1974).

STATEMENT OF THE CASE

This Petition arises from the district court's entry of summary judgment for the Petitioners, as Defendants below, in an action filed by the Respondent on September 18, 1975 in the United States District Court for the Northern District of Texas (Civil Action No. CA-1-75-44). The Respondent has alleged that the Petitioners, acting in violation of Section 1 of the Sherman Act, unlawfully prevented his entry into the retail alcoholic beverage business in Impact, Texas, and thereby injured him. The named Defendants are the City of Impact, its elected officials, retailers of alcoholic beverages, and two other corporations.

In 1961 the City of Impact, Texas enacted a comprehensive zoning ordinance, which divided Impact into districts zoned "R" (Residential) and districts zoned "C" (Commercial). This ordinance, which has never been amended or repealed, prevents the operation of any commercial enterprise, including a retail alcoholic beverage establishment, in a district zoned Residential. Some six years after the enactment of this ordinance, in 1967, the Respondent Whitworth purchased a lot in Impact which was and is located in a district zoned Residential. Acting on an alleged desire to enter the retail alcoholic beverage business on that lot, Respondent Whitworth, in 1975, submitted to the Secretary of the City of Impact, an "APPLICATION FOR A WINE AND BEER RETAILERS OFF-PREMISES PERMIT." This state-promulgated form requires as a prerequisite to the state's grant of a license to engage in the liquor business that, if the premises are located in an incorporated city, the City Secretary certify that the city's charter and ordinances do not prevent the sale of the alcoholic beverages at the location to be licensed.[1]

In accordance with the city zoning ordinance and the state liquor control statute the Secretary of the City of Impact refused to certify that the sale of alcoholic beverages was permitted on the property in question. Because the City Secretary could not certify his application consistently with state law, Respondent Whitworth could not obtain a state license to engage in the alcoholic beverage business on his residential lot, thereby allegedly suffering injury. Rather than seeking the repeal or amend-

1. See Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Arts. 666-24, 666-54, 667-10½ (1974).

ment of the 1961 zoning ordinance and instead of seeking a zoning change or variance through appropriate local procedures, Mr. Whitworth filed this Federal antitrust action alleging that the Petitioner-City and its officials entered into a contract, combination or conspiracy to restrict competition in the retail sale of alcoholic beverages and, in furtherance of that conspiracy, enacted the City's general zoning ordinance and refused to certify his wine and beer application. The Petitioners, who were not City officials, allegedly participated in this conspiracy "through their outright control of certain city council members."

In granting the Petitioners' motion for summary judgment, the district court found the local zoning ordinance to be in all respects valid and a proper exercise of the City's legislative power—thus removing the zoning ordinance from federal antitrust challenge. The Respondent did not challenge on appeal the trial court's determination that the ordinance was valid as a matter of state and federal law. The court of appeals, in its first opinion in this case, conceded the validity of the zoning ordinance as a matter of state law but reversed the summary judgment holding that since the enactment of the ordinance was itself alleged to be part of the conspiracy, the mere presence of the zoning ordinance did not insulate the Defendants from antitrust liability. Relying on *City of Lafayette, La. v. La. Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976), before this Court's opinion in that case, the court of appeals directed a factual inquiry as to whether the City's actions in zoning and in abiding by state liquor laws, were "comprehended within the powers granted to it by the Legislature."

The Petitioner filed a petition for a writ of certiorari in the October 1977 term of this Court (No. 77-734). On April 24, 1978, this Court granted the writ of certiorari and remanded this action to the court of appeals for reconsideration in light of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). On July 17, 1978, without the assistance of briefs or arguments from counsel, the court of appeals, upon apparent consideration of the complexities of the five separate opinions in *City of Lafayette*, entered its two sentence opinion (Appendix "A"), reinstating its prior opinion.

By their current petition for a writ of certiorari, the Petitioners seek this Court's review of the July 17, 1978 judgment of the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

QUESTION ONE: WHETHER THE SHERMAN ACT IS APPLICABLE TO A CITY'S OTHERWISE VALID EXERCISE OF ITS ZONING AUTHORITY, WHERE THE MANNER IN WHICH IT IS EXERCISED IS CONTEMPLATED BY STATE STATUTE AND WHERE THE RESULT COMPLAINED OF BY RESPONDENT IS AUTHORIZED BY STATE STATUTE?

(a) The Fifth Circuit's decision is in conflict with *City of Lafayette* and other decisions of this Court.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), this Court addressed the extent to

which cities were entitled to the protection afforded states under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny.[2] Because the plurality opinion in *City of Lafayette* emphasizes the relationship between the city's acts and the state government, a review of the involvement of the State of Texas in the acts of the Petitioner-City is an appropriate foundation for an analysis of the issues presented by the instant petition.

The decision of the City of Impact to zone the Respondent's lot residential and to prohibit the sale of liquor thereon originates with the sovereign power of the State of Texas. TEX. REV. CIV. STAT. ANN. art. 1011a grants to cities the power to zone in such a manner as to "regulate and restrict . . . the location and use of buildings, structures, and land for trade, industry, residence, or other purpose. . . ." Even more particularly, state statutes expressly recognize the right of an incorporated city to prohibit the sale of alcoholic beverages in areas zoned residential. Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Arts. 666-24, 667-10-1/2 (1974). Further, a city's decision to prohibit such sales in residential areas is enforced by the *state*. Texas law prohibits any person from engaging in the liquor business except upon receipt of a state license and upon conditions imposed by the state. Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Art. 666-4(a) (1974). When a liquor permit is sought for a location in an incorporated city, one of these conditions is that the city secretary must certify "whether or not the sale

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2. *E.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

of alcoholic beverages for which license or permit is sought is prohibited by charter, ordinance, or any amendment thereto." Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Art. 666-54 (1974). Thus the *bona fide* operation of *state law* prevented the Respondent Whitworth from entering into the liquor business on his lot, which had been zoned residential well before its purchase by him.

Although the brevity of the Fifth Circuit's opinion after remand from this Court renders it impossible to ascertain the manner in which the Fifth Circuit applied the complex guidelines of the *City of Lafayette* decision, the Petitioner would show that none of the views expressed in the five opinions in the *City of Lafayette* decision supports the refusal of the Fifth Circuit to protect the City of Impact from antitrust liability for its exercise of the uniquely sovereign and state-directed actions challenged by the Respondent.

In holding that cities are not automatically entitled to the protection of the *Parker* doctrine, a plurality of this Court in *City of Lafayette* held that "the *Parker* doctrine exempts only anti-competitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette*, 435 U.S. at 413 (1978). The plurality requires that there be "evidence that the State authorized or directed a given municipality to act as it did." 435 U.S. at 414. Although the plurality would not go as far as to require a city to point to a specific statutory authorization, the Petitioners suggest that the above-described statutory scheme is such an authorization.

Agreeing with the court of appeals, the plurality in *City of Lafayette* hold that the requisite state mandate exists "when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " 435 U.S. at 415. In light of the statutory authority given to the City of Impact relative to zoning and the regulation of the situs of liquor sales, the Court of Appeals in its earlier opinion in the instant case was in error in doubting that the challenged zoning ordinance was a "*bona fide* governmental decision" and "contemplated within the powers granted to it by the Legislature."

Zoning by its very nature has anticompetitive effects and TEX. REV. CIV. STAT. ANN. art. 1011a, in authorizing zoning, expressly contemplates geographic restrictions on land use for "trade, industry, residence or other purpose." That statute, especially when coupled with the detailed provisions of the Texas Liquor Control Act regulating all aspects of the sale of liquor (including location), should leave no doubt but that the challenged actions of the City of Impact were, in the words of the plurality, "pursuant to state policy to displace competition with regulation." 435 U.S. at 413. Other than a takeover of zoning functions by the State of Texas, the Petitioners cannot imagine a clearer authorization or direction by the State for the challenged actions of the City of Impact.

Not only is the decision of the court of appeals in conflict with the plurality opinion in *City of Lafayette* because of the extensive involvement of the State of Texas in the challenged actions by the City of Impact, but the Fifth Circuit's decision similarly finds no support in the two concurring opinions by Mr. Justice Marshall and

Mr. Chief Justice Burger, Mr. Justice Marshall joins in the plurality opinion with the caution that any protection for a city under the *Parker* doctrine exists only to the extent that the anticompetitive restraint is "necessary to effectuate governmental purposes." 435 U.S. at 418. Similarly, Mr. Chief Justice Burger would utilize a "commercial-sovereign" distinction and apply the *Parker* doctrine only where the challenged activity serves a public or sovereign function and not where the city engages in a proprietary enterprise. Under either concurring opinion, the actions of the City of Impact in zoning the lot which Respondent eventually bought as residential and in regulating the sale of liquor within its corporate limits is uniquely governmental and does not exceed what is necessary to accomplish that governmental purpose. The enactment of the zoning ordinance of the City of Impact was an act of government and not that of a private party trying to characterize its acts as state action nor that of a governmental unit competing in what is typically the private commercial realm.[3] Of course, under the view of the dissenters in *City of Lafayette*, the actions of the *City of Impact* would be entitled to the same protection as the state itself under *Parker*.

The decision by the court of appeals in exposing the City of Impact to antitrust liability under these circumstances is also in conflict with the earlier opinions of this Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) which provide part of the underlying support for the plurality's opinion in *City of Lafayette*. In *Goldfarb*, which held that *Parker* did not prevent the application of Section 1 of the Sherman Act to the enforcement of a minimum fee schedule by the state bar association, this Court recognized that absent enforcement by the Virginia Supreme Court of the bar association's ethical opinions, there could be no "state action." In contrast to this absence of state enforcement in *Goldfarb*, the City of Impact's zoning ordinance relative to the sale of liquor on residential lots was authorized by the state and is enforced by the state through the state's statutory refusal to grant a liquor license for a lot so zoned. Texas Liquor Control Act, V.A.T.S. Penal Auxiliary Laws, Art. 666-4 (a), 666-54 (1974). In complaining of the City Secretary's refusal to certify the residential lot for the sale of liquor, the Respondent Whitworth is complaining of the City Secretary's abidance with state liquor laws.

Furthermore, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court found no antitrust liability for the Arizona Supreme Court's adoption and enforcement of rules prohibiting lawyer advertising, recognizing that the State of Arizona was the "real party in interest." Distinguishing the facts of *Goldfarb* and *Cantor v. Detroit Edison Co., supra*, this Court acknowledged that "the regulation of the activities of the Bar is at the core of the state's power to protect the public," 433 U.S. at 361 and indicated that the result in *Cantor* would have been different had Detroit Edison Company been a governmental unit "respon[ding] to health or safety concerns" with a program "essential to regulation of electrical utilities." 433 U.S. at 361. Finally, as the plurality opinion in *City of Lafayette* found significant, this Court imposed no antitrust liability in *Bates* because "the state

3. *See Goldfarb v. Virginia State Bar, supra; Cantor v. Detroit Edison Co., supra.*

policy is so clearly and affirmatively expressed and . . . the state's supervision is so active." *Bates v. State Bar of Arizona*, 433 U.S. at 362; *City of Lafayette*, 435 U.S. at 410. The Petitioners suggest that the City of Impact's zoning ordinance as contemplated and enforced by the statutes of the State of Texas are, like the activities of the bar association in *Bates*, "at the core of the State's power to protect the public." This case involves the operation of two strong and clearly expressed areas of state concern, zoning and liquor regulation, both of which bring this case squarely within this Court's decision in *Bates*.

To the extent that the Fifth Circuit has permitted the City of Impact to be exposed to antitrust liability for the exercise of a uniquely sovereign function under the direction and guidance of clearly expressed state law, the decision of the court of appeals herein is in conflict with the decision of this court in *City of Lafayette, Bates, Goldfarb, Cantor* and *Parker*.

(b) The Fifth Circuit's decision permits a drastic departure from the traditional and proper role of federal courts in state or local legislative matters and is in conflict with the principles enunciated in this Court's decisions in *Noerr* and *Pennington*.

This petition raises the issue of antitrust review by federal courts of all regulatory functions of local and state governments. In spite of the role of the state and the extensive statutory basis for the action of the City of Impact, the Fifth Circuit would nevertheless require, as it did in its earlier opinion in this case, a judicial inquiry into "whether there was a conspiracy" and an examination of the motives and intent which underlie the legislative act of the City. Thus by the mere allegation of a conspiracy, federal courts would go behind legislative decisions of governmental bodies in order to identify and then weigh the factors which contributed to the enactment. The Petitioners suggest that such an examination and review is in conflict with this Court's decisions in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Furthermore, because zoning always has some anticompetitive effects, the decision has opened courthouse doors for a tedious review of the motives behind all zoning ordinances both at the time of their passage and, as here, at a later time when a prospective plaintiff purchases a residentially zoned lot. It is particularly significant in the instant case that the Fifth Circuit is requiring such a review without the City having ever been presented with an opportunity to consider an amendment to the ordinance or a variance. The filing of a federal antitrust action should not excuse such a plaintiff from utilizing these local procedures. *See Brawner Building, Inc. v. Shehyn*, 442 F.2d 847 (D.C. Cir. 1971).

Because of the disastrous impact which treble damage liability would have upon the operations of innumerable municipalities,[4] federal antitrust review of the acts of city governments must be carefully considered. Although the majority of this Court rejected the dissenting view that all actions of cities are protectible under *Parker*, this

4. Indeed a primary concern of Mr. Justice Blackmun, dissenting in *City of Lafayette*, was the impact of treble damages on the services provided by cities. 435 U.S. at 442.

Court in *City of Lafayette* nevertheless was careful to delineate the circumstances under which such antitrust review could take place. Ignoring these guidelines, the Fifth Circuit has interposed another, and much broader, basis for federal court review. By the mere allegation that the legislative enactment of a municipality was part of the conspiracy, the court of appeals would permit the review of all municipal actions whatever their state statutory basis or uniquely governmental character. Traditionally the manner in which state and local governments conduct their legislative affairs has been guided by the election process. The Fifth Circuit's decision below grants a potential veto power over these legislative enactments to those antitrust plaintiffs whose perception of community needs differs from that of the elected officials. Prior to the Fifth Circuit's decisions in this case, that court recognized the nearly universal rule that "the *only* question which federal courts may consider is whether the action of the zoning authority is arbitrary and capricious and having no substantial relation to the general welfare," *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974) *cert. denied* 419 U.S. 837 (1974) [emphasis added]. The court of appeals opinion in the instant case apparently creates an additional question for consideration where a federal antitrust violation is alleged.

The district court reviewed the zoning ordinance of the City of Impact and found it valid under the traditional standards for review of zoning. This finding was unchallenged on appeal and was assumed by the Fifth Circuit. Rather than permitting the federal courts to become zoning appeals boards, the Petitioners respectfully suggest that federal court inquiry into the myriad of underlying

considerations should cease and that zoning and liquor regulation should be returned to its proper legislative status in the Fifth Circuit.

(c) The manner in which the Fifth Circuit reconsidered this action on remand from this Court departed from the usual and accepted method of reconsideration in such a complex and important area of law.

The importance of the issues presented by this petition to all government entities which engage in such purely governmental functions as zoning and liquor regulation cannot be overstated. Especially in light of the complexities of the *City of Lafayette* opinion, these cities properly looked to the court of appeals in the instant case to address the application of *City of Lafayette* principles to such a strongly governmental and state-authorized act as zoning.

While the Fifth Circuit may very well have studied the delicate standards of *City of Lafayette* and applied them to this case, its opinion of two sentences does not evidence such a study. Moreover, the court of appeals entered its terse opinion without the benefit of any briefs or argument. The Petitioners sought and still seek the opportunity to present to the court their views on the application of the *City of Lafayette* to this case, such as set forth above. It is respectfully suggested that the narrow affirmance by this Court in *City of Lafayette* does not mean that the Fifth Circuit's earlier decision in this case, based upon that court's *City of Lafayette* opinion, is necessarily correct.

The denial to the Petitioners of an opportunity to brief its views on the subtle changes introduced by *City of Lafayette,* and, perhaps, to elicit a more detailed opinion after the Fifth Circuit's reconsideration, has implications far beyond this case. In particular, by so summarily adopting its earlier opinion in this case without any explanation of the presumed application of the Court's *City of Lafayette* opinion, the Fifth Circuit has created enormous confusion among the thousands of municipalities who regularly engage in zoning and assist their state in the regulation of liquor sales. Because the court of appeals did not distinguish the circumstances of the instant case nor otherwise explain their implicit holding that these sovereign acts of the City of Impact are subject to antitrust liability, the only conclusion which these governmental entities can draw from the court of appeals' opinion after remand is that their traditionally governmental activities of zoning and liquor regulation pursuant to state authority is, in the Fifth Circuit at least, an activity outside the protection of *Parker* as explained in *City of Lafayette.* Whatever the proper result, the Petitioners respectfully suggest that, at a minimum, the Fifth Circuit should have explained its holding and its views of the *City of Lafayette* under the unique and compelling circumstances of this case. Because of the central importance of zoning activities to nearly every municipality in the country, many of which have meager coffers, a more complete reconsideration of this case after *City of Lafayette* was warranted in the interest of justice and judicial efficiency.

QUESTION TWO: WHETHER A PRIVATE PLAINTIFF HAS STANDING UNDER THE ANTITRUST LAWS TO CHALLENGE A CITY'S OTHERWISE VALID ZONING ORDINANCE WHEN THE BUSINESS WHICH WAS ALLEGEDLY INJURED COULD NOT COME INTO EXISTENCE BY REASON OF STATE LAW AND THE ORDINANCE AND WHEN THE LOCATION FOR WHICH THE BUSINESS IS SOUGHT WAS ZONED RESIDENTIAL BEFORE ITS PURCHASE BY PLAINTIFF?

(a) The Fifth Circuit's decision conflicts with the decision of other circuits by contravening important and well-established principles of standing.

In granting summary judgment for the Petitioners, the district court in part based its decision on doctrines of causation, injury and standing. That court recognized that Mr. Whitworth had acquired his lot six years after that lot had been zoned as residential by the City of Impact. Even if the Court of Appeals was correct in its *Parker* analysis, its decision is in direct conflict with the Court of Appeals for the District of Columbia in *Clouser v. David,* 309 F.2d 233, 234 (D.C. Cir. 1962) *cert. denied,* 372 U.S. 929 (1963). Under similar undisputed facts, the *Clouser* court held that summary judgment was appropriate for the Defendants when the "hardship, if any, has not resulted from the location, situation, or condition of the property, but solely from [the Plaintiff's] appropriation of it for commercial purposes without first having obtained the necessary change in zoning." Similarly, the Tenth Circuit in *C. F. Lytle Company v. Clark,* 491 F.2d 834 (10th Cir. 1974) refused to find that the

zoning ordinances resulted in any "taking" where the Plaintiff's voluntary acts caused the hardship. By purchasing a residentially zoned lot, Respondent Whitworth's protectable property interest never included, *ab initio,* a potential for commercial use.[5] Because no protectable legal right of the Respondent Whitworth was affected by any act of the City of Impact or its officials, the Fifth Circuit, by allowing this case to continue, has broadened traditional concepts of standing to an unconscionable degree.

From a statutory perspective, the standing requirement of Section 4 of the Clayton Act, 15 U.S.C. § 15, that a private antitrust be "injured in his business or property" has been seriously eroded by the Fifth Circuit's decision. It is fundamental that the injury required to confer standing under Section 4 is a violation of a legal right. *Maltz v. Sax,* 134 F.2d 2 (7th Cir. 1943) *cert. denied,* 319 U.S. 772 (1943). When as here, a plaintiff does not have an operating business he has not suffered an injury to his "business or property" and has no cause of action unless he can further show that he had made substantial preparation to enter the business and was on the threshold of entry. *Martin v. Phillips Petroleum Co.,* 365 F.2d 629 (5th Cir. 1966). But even if Respondent Whitworth were to show a desire to enter the liquor business at his location in Impact and show some preparation to do so, it is certain that he could not, by operation of state law, establish that business, because so long as the valid zoning ordinance prevents the sale of liquor at that lo-

5. Texas courts have reached the same conclusion. In *Swain v. Board of Adjustment of City of University Park,* 433 S.W.2d 727 (Tex. Civ. App.—Dallas, 1968, writ ref'd n.r.e.) *cert. denied* 396 U.S. 277 (1969) the court held that "no vested rights were acquired by the use of the property contrary to the purpose of the ordinance."

cation he cannot obtain the necessary license from the state. Given this factual and legal impossibility under state law of establishing the business in question, the Respondent can have no protectable "business or property" within the meaning of Section 4.[6] *Okenfenokee Rural Electric Membership Corp. v. Florida Power & Light Co.,* 214 F.2d 413 (5th Cir. 1954); *Peller v. International Boxing Club,* 227 F.2d 593 (7th Cir. 1955); *American Bankers Club, Inc. v. American Express Co.,* 1977 Trade Cases # 61,247 (D. D.C. 1977). As with the plaintiff in *Okenfenokee,* Respondent Whitworth had "no legal right" without permission from the state. This important and well-established requirement of causation and a violation of a legal right has now apparently been abandoned by the Fifth Circuit.

In contrast to other courts which require the plaintiff to show that he would have been in the particular business "but for" the defendants' acts,[7] the Fifth Circuit has permitted Respondent Whitworth to maintain a cause of action when the alleged injury results entirely from the operation of state law. Petitioners respectfully urge that when the sole cause of injury is valid state action, it naturally follows that a plaintiff lacks standing under Section 4 of the Clayton Act to go behind that state action and maintain a claim against any private parties who happen to benefit from it.

6. The standing requirements of Section 16 of the Clayton Act, 15 U.S.C. § 26 have been similarly interpreted. *See, e.g., Credit Bureau Reports, Inc. v. Retail Credit Company,* 476 F.2d 989 (5th Cir. 1973); *Reibert v. Atlantic Richfield Company,* 471 F.2d 727 (10th Cir. 1973).

7. *See, e.g., Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 184 F.Supp. 440 (D. Pa. 1960), aff'd 297 F.2d 199 (3rd Cir. 1961) *cert. denied* 369 U.S. 839 (1962).

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

EDGAR E. WHITWORTH,
d/b/a Dinkie's Food Mart, Plaintiff-Appellant,

v.

DALLAS PERKINS, et al.,
Defendants-Appellees.

NO. 76-1593.

United States Court of Appeals,
Fifth Circuit.

July 17, 1978.

Appeal from the United States District Court for the Northern District of Texas; Leo Brewster, Judge.

On Remand from United States Supreme Court.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The judgment of this Court reported at 559 F.2d 378 (5th Cir. 1977) has been vacated and remanded by the Supreme Court for further consideration in light of its opinion in *City of Lafayette v. Louisiana Power & Light Co.*, ___U.S.___, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

Upon reconsideration in light of *City of Lafayette*, the opinion of this Court as published is reinstated and the judgment of the district court is reversed and remanded for further proceedings consistent with our opinion and that of the Supreme Court.

REVERSED AND REMANDED.

APPENDIX "B"

CITY OF IMPACT, et al.,
Petitioners

v.

EDGAR E. WHITWORTH, etc.

No. 77-734

Facts and opinion, Whitworth v. Perkins, 559 F.2d 378.

April 24, 1978. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition for a writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S.____, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

APPENDIX "C"

EDGAR E. WHITWORTH,
d/b/a Dinkie's Food Mart, Plaintiff-Appellant,

v.

DALLAS PERKINS, et al.,
Defendants-Appellees.

NO. 76-1593.

United States Court of Appeals,
Fifth Circuit.

September 19, 1977.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This antitrust suit charges that defendants conspired to restrain competition in the sale of alcoholic beverages in Impact, Texas, by preventing plaintiff from making such sales on his property. The defendants are the town (a municipal corporation), six individuals (sued both individually and as aldermen of the town), and three private Texas corporations (including the corporation which developed this new town and those authorized to sell liquor in the town).

The district court entered summary judgment for the defendants. It concluded that the city's valid zoning ordi-

nance, under which the operation of a liquor business on plaintiff's property is prohibited, bars recovery regardless of whether defendants' actions otherwise violate the antitrust laws. It reasoned that the "cause" of the plaintiff's injury would be the ordinance rather than any illegal conspiracy.

[1] The judgment is reversed. The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade. There are also significant questions concerning the availability of the "state action" exception to the antitrust laws which may have to be legally and factually developed and confronted on remand in the determination of this case.

Taylor County, Texas, and its largest city, Abilene, do not permit the sale of alcoholic beverages. In 1961 the individual defendant Dallas Perkins incorporated the town of Impact near Abilene under the relevant Texas statutes. Tex. Rev. Civ. Stat. Ann. art. 1133 (Vernon 1963). It had over the requisite 200 inhabitants but only 31 qualified voters. After litigation, Impact was held by the Texas courts to have been validly incorporated. *See Perkins v. State,* 367 S.W.2d 140 (Tex. 1963). Shortly thereafter, the new city authorized the sale of alcoholic beverages under the local option provisions of Texas law. Tex. Penal Code Ann. art. 666-32 (Vernon 1976 Auxiliary Pamphlet). Thus was created an "oasis" on the boundary of a "dry" city in a "dry" county. At approximately the same time the city council enacted a comprehensive zoning ordinance. That ordinance pro-

hibited the sale of alcoholic beverages on lots zoned residential.

In 1967 the plaintiff purchased a lot zoned residential. In 1975 he attempted to secure appropriate authorization to sell alcoholic beverages on that land. This was denied by the city because of the ordinance. He then commenced this action against the City of Impact, its mayor, secretary, and the three other aldermen of Impact, and various other private defendants engaged in or related to persons engaged in the sale of alcohol in Impact.

The district court determined that the zoning ordinance had been enacted in accordance with Texas law. That determination is accepted as being accurate for the consideration of this case.

The court then stated that it had no authority to inquire into the "motives or the integrity of the members of the municipal legislative body in the exercise of their legislative powers" and concluded that the plaintiff would "not be entitled to use his property in Impact for a place to sell alcoholic beverages regardless of what the defendants' conduct has been in regard to the alleged antitrust violations."

[2] Plaintiff clearly alleges that the defendants enacted the ordinance for the precise purpose of excluding him from the liquor business in furtherance of their conspiracy:

> At various times since the inception of the contract, combination or conspiracy, the Defendants have engaged in various overt acts in furtherance thereof, some of which are known to the Plaintiff . . . . Specifically, the Defendants, . . . in their capacity as Aldermen of the City of Impact, have at various

> times purportedly enacted various ordinances regulating the sale of alcoholic beverages within said City and restricting such sales to certain areas. These ordinances include . . . an ordinance dated December 29, 1961, entitled "Zoning Ordinance for the City of Impact, Texas," . . . .

If the plaintiff can prove this allegation and that he was harmed by the zoning ordinance, questions remain as to whether the ordinance was passed as part of an illegal conspiracy, and whether any acts violative of the antitrust laws are nonetheless immunized because the ordinance was the product of state action.

The starting point for the latter question is *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In that case an injunction was sought against a state agricultural marketing program for raisins. The program had been created by state statute and reduced the amount of competition in the market for raisins. The Supreme Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-351, 63 S.Ct. at 313. In the three decades since that opinion the contours of this exclusion have been constantly redefined.

It is readily apparent that there are many factual differences between the scheme left undisturbed in *Parker* and the one here at issue. *Parker* involved the conduct of a state, while we are concerned with a city, acting under state law. *Parker* involved a program allegedly enacted for the public good, while here the allegation is that the program was enacted to further private financial objectives. Finally, in *Parker* the questioned state program

had been adopted "with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture." There is no such federal, or even state conduct suggesting tacit approval in the present case. In fact, this case appears to fall precisely within a category that the *Parker* Court specifically refrained from dealing with. As the Supreme Court put it, that case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade". 317 U.S. at 351-352, 63 S.Ct. at 314. That is the question here.

[3] In resolving this type of question this Court has recognized that the *Parker* doctrine is not to be applied automatically. A thoughtful analysis is called for to ensure that it is a *bona fide* governmental decision for which exemption is being sought.

> [I]t is not every governmental act that points a path to an antitrust shelter. We reject "the facile conclusion that action by any public official automatically confers exemption." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders Inc.*, 1 Cir. 1970, 424 F.2d 25, 30. In *Ashville Tobacco Board of Trade, Inc. v. FTC*, 4 Cir. 1959, 263 F.2d 502, 509, the court stated: ". . . such action must be state action not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful."

Woods Exploration & Pro. Co. v. Aluminum Co. of *America*, 438 F.2d 1286, 1294 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736

(1972). This Court's focus on the nature of the decision made by the governmental unit which claims the protection of *Parker* was reflected in *Jeffrey v. Southwestern Bell,* 518 F.2d 1129, 1134 (5th Cir. 1975), where the activity was scrutinized to be sure that it was not "perfunctory" or "slipshod." *See also Gas Light Co. of Columbus v. Georgia Power Co.,* 440 F.2d 1135 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062, 92 S.Ct. 732, 30 L.Ed.2d 750 (1972).

If, on remand, the district court reaches the state action exemption inquiry, it will need to take careful note of two recent Supreme Court opinions which clarify the scope of that doctrine. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), concerned a regulated utility which provided free light bulbs to consumers. It could not discontinue this practice unless it filed a new tariff with the state public service commission. The cessation of the light bulb program without governmental approval would constitute a violation of state law. The Court nonetheless held that the state action defense was not available. *Bates v. State Bar of Arizona,* ____U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d____ (1977), addressed an attack on State Supreme Court rules prohibiting lawyers from advertising. The Court there ruled that because the allegedly anticompetitive practice had been adopted by the affirmative act of the state and reflected its policies, the state action defense was available. Whether *Parker* might shield the defendants in the instant case can only be determined by careful consideration of these latest pronouncements.

[4] Finally, we note that where the governmental unit concerned is other than a state itself, such as the municipality here, a more thorough analysis is required before *Parker* can be held to apply.

> A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. . . . the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.

City of Lafayette, La. v. La. Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976), *cert. granted,* ____U.S. ____, 97 S.Ct. 1577, 51 L.Ed.2d 791 (U.S. 1977). Based on the pleadings in this case and this line of authority interpreting *Parker,* we are unable to say at this early stage that the plaintiff could prove no set of facts which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Hepperle v. Johnston,* 544 F.2d 201 (5th Cir. 1976).

In the oral argument of this case, numerous factual representations were made in defense of the district court's decision which have no support in the record now before us. Matters such as the number of acres in Impact which are zoned for commercial use, who owns such land, the relationship of these zones to each other, and the past and present status of the parcel of land owned by the plaintiff are all issues which do not appear in the docu-

ments used to come to a summary disposition. In order to properly develop these, and other facts, and to conduct the inquiry into the *Parker* question, if such an inquiry proves necessary, the case must be remanded. Our decision does not in the least forecast the probable outcome of this litigation. Whether there was a conspiracy, or whether any conspiracy restrained trade or competition, or whether the zoning provisions "fall within the limited state action immunity doctrine [are] question[s] that we do not reach; it is for the trial court, in the first instance, to make this determination." *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 423 (5th Cir. 1976).

REVERSED AND REMANDED.

APPENDIX "D"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

CA 1-75-44

EDGAR E. WHITWORTH, D/B/A
DINKIE'S FOOD MART

v.

DALLAS PERKINS, NANCY PERKINS, His Wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORPORATION, TOM RODEN, PINKIE'S, INC., CITY OF IMPACT and HFW CORPORATION

(Filed January 30, 1976)

MEMORANDUM OPINION ON MOTIONS
FOR SUMMARY JUDGMENT

This suit, brought under Section 1 of the Sherman Anti-Trust Act (15 U.S.C. #1), charges that the defendants have engaged in various acts amounting to a contract, combination or conspiracy in restraint of trade or commerce among the several states. The plaintiff claims that such alleged conduct has prevented him from selling alcoholic beverages on a lot in Impact owned by him. He seeks declaratory and injunctive relief, treble damages,

attorneys' fees and court costs on account of the alleged anti-trust violations. He also alleges that certain acts of the defendant are in violation of Texas law, and prays for declaratory and injunctive relief in relation thereto.

The defendants are:

1. The town of Impact, Texas, a municipal corporation.

2. Dallas Perkins and his wife, Nancy Perkins, R. L. Perkins, Dickie W. Maxwell and Marion Teel, each of whom is sued both individually and in his official capacity as Aldermen of the City of Impact.

3. Impact Development Corp., Pinkie's Inc., and HFW Corp., each of which is a private corporation chartered under the laws of Texas.

The theory of plaintiff's case is that the town of Impact was chartered, and has been manipulated, by the other defendants for the purpose of enabling such defendants to have a monopoly on the sale of alcoholic beverages on a small "oasis" in the middle of a vast expanse of "dry" territory.

The case is now before the Court on motions filed by the defendants for dismissal or, in the alternative, for summary judgment.[1] Briefs have been filed and a hearing has been held on the motions. One of the grounds relied upon by the movants is that a zoning ordinance of the town of Impact, adopted about six years before plaintiff

1. Three of such motions are filed. One is by the town of Impact, Dallas Perkins, Nancy Perkins, R. L. Perkins, Dickie Maxwell and Marion Teel. Another motion is by the defendants, Tom Roden and Pinkie's, Inc. A third motion is by Impact Development Corporation. The first motion sets out the grounds relied upon, and the other motions adopt such grounds by reference.

acquired his lot, limits the use of the area which includes plaintiff's property to residential purposes only; and that the plaintiff would therefore not be entitled to use his property in Impact for a place to sell alcoholic beverages regardless of what the defendants' conduct has been in regard to the alleged anti-trust violations. The Court is of the opinion that this point is well taken, and that consideration of the other grounds is unnecessary. The case will be disposed of by summary judgment.

A review of the background of the town of Impact and the liquor business there will be helpful to an understanding of the claims here presented. That review is based on admissions of the parties, affidavits and documents on file herein, and the facts of which the Court may take judicial notice.[2] Some of these facts are mentioned in the opinions of the Supreme Court of Texas involving challenges of the legality of the incorporation of Impact. Perkins v. Ingalsbee, 347 S.W.2d 926 (1961). and Perkins v. State, 367 S.W.2d 140 (1963).

Impact is in Taylor County, Texas. Abilene is the county seat of Taylor County and the hub city of the area of Texas generally known as the "Big Country". The 1960 census showed that Abilene had a population of 90,368. Three large church supported schools of higher learning have been located in the city for many years.[3] At the time of the incorporation of Impact in 1961, Abilene and all of Taylor County and most of the voting

2. The matters judicially noticed are geographical and historical facts of common knowldge and census figures. 600 California Corp. v. Harjean, N.D. Tex., 284 F.Supp. 843 (1968), and cases therein cited.

3. Abilene Christian College is supported by the Church of Christ; Hardin Simmons University, by the Baptist Church; and McMurray College, by the Methodist Church.

units in the surrounding counties did not allow the sale of alcoholic beverages. Dallas Perkins, one of the defendants herein, undertook to provide an alcoholic beverage oasis through the incorporation of Impact and a subsequent election therein under the Texas Liquor Control Act.[4]

The local option system governs the sale of alcoholic beverages in Texas. Art. 16, Sec. 20, Constitution of Texas; Art. 666-32, Vernon's Ann. Texas Penal Code.[5] Upon the filing with the proper county clerk of a petition meeting the statutory requisites and containing the actual signatures of at least 35% of the qualified voters of a county, justice precinct or incorporated city or town, an election is required to be called to determine whether to make legal the sale of alcoholic beverages of one or more of the various types and alcoholic contents in the voting unit involved.

There was in 1960 a sparsely settled, unincorporated area of slightly more than 600 acres, with 85 qualified voters, known as North Park, adjoining the northwest boundaries of Abilene. Perkins selected 47.13 acres out of that area to incorporate as the town of Impact.[6]

4. The local option provisions of the Texas Liquor Control Act permit authorization of the sale of alcoholic beverages in a municipal corporation in a dry county. Myers v. Martinez, Tex. Civ. App., 320 S.W.2d 862, writ refused, n.r.e., 326 S.W.2d 171.

5. Chapter 8, Title 11 of the Texas Liquor Control Act, was originally codified as Articles 666 (intoxicating liquors) and 667 (malt liquors), Vernon's Ann. Texas Penal Code, and that was the citation for it at the time of the incorporation of Impact and the liquor election therein. The new Texas Penal Code, adopted in 1973, neither repealed nor incorporated the above provisions of the Act. They are still in force, and are found in the Penal Auxiliary Laws Pamphlet pending enactment of the Alcoholic Beverages Code.

6. Perkins was severely criticized by his opponents in the state court litigation involving the incorporation of Impact for lifting only a small parcel out of the larger area of North Park. It was not unusual to expect a person with his plans to use only land that he owned or could control, as local option elections could be held frequently.

Art. 1133, Vernon's Ann. Texas Civil Statutes, permitted the incorporation of a town having more than 200 inhabitants. The area proposed to be incorporated as Impact had slightly more than 200 inhabitants, 31 of whom were qualified to vote. The vote in the election on the issue of incorporation was 27 "for" and none "against". The town of Impact was declared to be incorporated on August 2, 1961. The municipal officials were elected by write-in votes on August 14, 1961. Shortly thereafter, a local option election was held, and the voters of Impact legalized the sale of all types of alcoholic beverages for off-premises consumption.

The land in the Impact area was a marsh until recent years, and the improvements on it are few and inexpensive. There were no commercial or public buildings, churches or schools there at the time of its incorporation. There has been little growth or development since the incorporation. Four of the five commercial buildings there now are used in connection with the liquor and beer businesses which plaintiff alleges are owned and operated by some of the defendants. The other commercial building is used solely for a grocery store. There are still no public buildings, churches or schools in Impact.

On October 4, 1967, the plaintiff purchased from Jimmie M. Lorenz the lot in Impact on which he now says he wants to operate a liquor business. On December 29, 1961, the town of Impact enacted a comprehensive zoning ordinance which is still in effect. That ordinance restricts to residential use the area embracing the lot

in question. There is no claim that there has ever been any commercial use of any of that property. The plaintiff concedes that the zoning ordinance prohibits the use of his lot for the operation of a liquor business or for any other commercial use. He says, however, that the zoning ordinance is invalid for each of the following reasons.

1. It constitutes a deprivation of due process and a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the federal constitution.

2. It was enacted for the purpose of preventing competition which was not within the contemplation of the state statutes authorizing municipalities to enact such ordinances.

3. It was enacted by a city council "comprised in significant part of persons having such a direct or indirect conflict of interest as to render ordinances passed by them relating to the regulation of the sale of alcoholic beverages null and void."

The validity of zoning ordinances enacted pursuant to statutory authority has long been recognized by the Supreme Court of the United States and the Supreme Court of Texas. Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Lombardo v. City of Dallas, Tex. S.Ct., 73 S.W.2d 475 (1934). Such ordinances are not unconstitutional merely because they result in loss to owners of property by restricting its use. Lombardo v. City of Dallas, supra, at p. 478. They do not constitute a taking of property under the right of eminent domain requiring compensation. Ellis v. City of West University Place, Tex. S.Ct., 175 S.W.2d 396,

398 (1943). It is not necessary to go into detail in describing the ordinance here involved. It is on file with the papers in this case. There is no claim of spot zoning or of retroactivity. The ordinance is comprehensive in nature and within the scope of the Texas zoning statutes. (Art. 1011a, b, Vernon's Ann. Tex. Civ. Statutes). There is no claim that there was a business operation on the property in question at the time of the passage of the ordinance. There is no basis for the claim that the ordinance was unconstitutional on the grounds set out in the first contention. Central Bank & Trust Co. v. City of Miami Beach, 5 Cir., 392 F.2d 549 (1968); Blackman v. City of Big Sandy, 5 Cir., 507 F.2d 935 (1975).

The second and third grounds—the motives of the councilmen and their conflict of interest—will be disposed of together.

Plaintiff says that the City Council which passed the zoning ordinance was composed of Dallas Perkins, the owner of an interest in the liquor stores in Impact, his wife, Nancy Perkins, his father, R. L. Perkins, and two employees of the liquor stores owned by some of the defendants. He argues that their connection with or relation to such liquor stores created such a conflict of interest in regard to the zoning of Impact that the zoning ordinance voted for by them was invalid.

The passage by a municipal corporation of a zoning ordinance represents the exercise of its legislative powers. City of Bellaire v. Lamkin, Tex. S.Ct., 317 S.W.2d 43 (1958). The courts have no authority to inquire into the motives or the integrity of the members of the municipal legislative body in the exercise of their legislative powers. Soon Hing v. Crowley, 113 U.S. 703, 710, 5

S.Ct. 730, 28 L.Ed. 1145 (1884); Auto Transit Co. v. City of Fort Worth, Tex. Civ. App., 182 S.W. 685 (1916), writ refused; City of San Antonio v. Fetzer, Tex. Civ. App., 241 S.W. 1034 (1922), writ refused; City of San Antonio v. Walters, Tex. Civ. App., 253 S.W. 544 (1923), writ refused; Community Natural Gas Co. v. Southern Texas Utilities Co., Tex. Civ. App., 13 S.W.2d 184 (1929); writ dis.; Burford v. City of Austin, Tex. Civ. App., 379 S.W.2d 671 (1964), writ refused, n.r.e.; 2 McQuillin on Municipal Corporations, Sec. 739.

City of San Antonio v. Fetzer, supra, quoted the following from McQuillin on Municipal Ordinances, Sec. 257:

> "Neither the motives of the members, nor the influences under which they acted, can be shown to nullify an ordinance duly passed in legal form, within the scope of their corporate powers."
>
> "A court has no right to sit in judgment upon the motive or intent of such bodies in the performance of a purely legislative act whereof they have undoubted jurisdiction. *That right belongs exclusively to the voters to whom the legislative body is responsible.*" City of San Antonio v. Fetzer, supra.

The following is quoted from the opinion in City of San Antonio v. Walters, supra:

> "In considering the questions involved in this appeal, we remove from the discussion all inquiry into the good faith or motives of the commission government of the City of San Antonio. That is a matter not subject to judicial inquiry."

In oral arguments on the motions, plaintiff's counsel stated that he had been unable to find a Texas case

holding an ordinance of general application invalid because it affected the interest of one or more of the members of the municipal legislative body who voted for its passage. The cases which he claims are most nearly in point are Moody v. City of University Park, Tex. Civ. App., 278 S.W.2d 912 (1955), writ refused, n.r.e.; and Hager v. State et rel Te Vault, Tex. Civ. App., 446 S.W.2d 43 (1969), writ refused, n.r.e. Neither one of those cases is in point.

In the Hager case, it was held that a member of a city council whose recall was demanded was disqualified to vote on the resolution which authorized notice of appeal from judgment in mandamus action requiring city council to call an election for such recall. That case is distinguishable on the ground that the subject matter voted upon directly and immediately affected the councilman in question individually, instead of being one of general application.

The Moody case involved members of the City Board of Adjustment. The powers in question were quasi-judicial, not legislative. The members of the Board were also appointed, rather than elected.

It would be impossible for a legislative body to function if its members were required to operate under the conflict of interest standard applied to judges, as plaintiff here contends they should be. How many members of Congress, state legislatures or city councils would be left to vote on a general tax bill, if all those affected by the taxes were disqualified? Successful business men are constantly urged to serve on city councils. They are affected by many of the ordinances of general application. It is apparently necessary to make the test whether or

not the proposed legislation directly and immediately affects the legislator individually.[7]

The Court is of the opinion that the zoning ordinance bars recovery by the plaintiff as a matter of law, and that summary judgment should be rendered in favor of the defendants.

Signed, January 29, 1976.

/s/ LEO BREWSTER
Judge

7. Nothing herein shall be taken to mean that the Court personally endorses the conduct of the members of the City Council, if it was as claimed by the plaintiff. The cases apparently hold that more harm would be done by allowing inquiry into the motives of legislators voting on matters of general application, than by not doing so.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

C.A. NO. 1-75-44

EDGAR E. WHITWORTH, D/B/A
DINKIE'S FOOD MART

v.

DALLAS PERKINS, NANCY PERKINS, His Wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORPORATION, TOM RODEN, PINKIE'S, INC., CITY OF IMPACT and HFW CORPORATION

* * *

SUMMARY JUDGMENT

The motions for summary judgment filed by the defendants herein have been duly presented and argued in a hearing held after proper notice, with the respective attorneys of record for the various parties hereto present and participating; and the Court has reached the conclusion that such motions should be granted for the reasons set out in its memorandum opinion filed in connection herewith.

It is accordingly decreed that the plaintiff, Edgar E. Whitworth, take nothing as against any of the defendants herein, and that the court costs of this suit be taxed against him.

Signed, January 29, 1976.

/s/ LEO BREWSTER
Judge

APPENDIX "E"

APPLICABLE STATUTES

(in pertinent part)

Section One, Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . .

Section Four, Clayton Act, 15 U.S.C. § 15:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

Section Sixteen, Clayton Act, 15 U.S.C. § 26:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

Tex. Rev. Civ. Stat. Ann. art. 1011a:

> For the purpose of promoting health, safety, morals, and for the protection and preservation of . . . the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict . . . the location and use of buildings, structures, and land for trade, industry, residence, or other purpose. . . .

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 666-4:

> . . . (a) It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from the state, transport, distribute, warehouse, store, solicit orders for, take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such privilege. . . .

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 666-24:

> In any city where the sale of liquor as herein defined is prohibited by its charter from being sold in its residence section, or any part thereof, such charter amendment shall remain valid and continue effective until such time as said charter provision may be repealed or amended as provided by law.

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 666-54:

> . . . The city secretary or clerk of the city in which an application for a license or permit is made shall certify whether or not the location or address is in a wet area and whether or not the sale of alcoholic beverages for which license or permit is sought is prohibited by charter, ordinance or any amendment thereto.

Texas Liquor Control Act, V.A.T.S.
Penal Auxiliary Laws, Art. 667-10½:

> In any incorporated city or town where the sale of beer as defined in the Texas Liquor Control Act is prohibited by charter or amendment thereto or

by any ordinance from being sold in the residential section, such charter amendments or ordinances shall remain valid and continue effective until such time as such charter provisions, amendments, or ordinances may be repealed or amended.

All incorporated cities and towns are hereby authorized to regulate the sale of beer within the corporate limits of such cities and towns by charter amendment or ordinance, and . . . designate certain zones in the residential section or sections of said cities and towns where . . . such sales may be prohibited. . . .

NOTE: In 1977, after the filing of the instant case, the Texas Legislature repealed the entire Texas Liquor Control Act and substituted therefor the ALCOHOLIC BEVERAGE CODE, which made no substantive change in the above sections.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-889

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS, his wife, R.L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S INC.,

Petitioners,

v.

EDGAR E. WHITWORTH, d/b/a DINKIE'S FOOD MART,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. Did the Court of Appeals fail to comply with this Court's order of remand?

2. Must a private antitrust litigant alleging a conspiracy between municipal officials and others to violate the Sherman Act establish, as a prerequisite to recovery, the invalidity under the state law of acts of the defendant officials in furtherance of the conspiracy?

3. Is an antitrust claim barred on grounds of "standing" merely because the defendants' allegedly anticompetitive conduct has succeeded in making it impossible under state law for the plaintiff to open his business?

STATEMENT OF THE CASE

This is a private antitrust suit which seeks to force competition on a handful of closely related persons and entities who control both the retail liquor business and the local government of Impact, Texas, a tiny but lucrative "'oasis' in the middle of a vast expanse of 'dry' territory" in western Texas. (Pet. 32). Impact is comprised of approximately forty-seven acres and was incorporated as a municipality by the petitioner Dallas Perkins in 1961. At that time, the sale of alcoholic beverages was prohibited in neighboring Abilene, a city of over 90,000 people, in Taylor County, and in most surrounding counties. (Pet. 33-35). Shortly after incorporation, a local option election was held, and by a vote of 27-0 the citizens of Impact legalized the sale of all types of alcoholic beverages for off-premises consumption. (Pet. 35). Within six months following that election, the governing body of Impact had enacted three ordinances, the combined effect of which was to restrict the sale of alcoholic beverages to areas within Impact owned or controlled by Mr. Perkins, the petitioner Tom "Pinkie" Roden, or their respective corporate alter egos.[1]

[1]Among these ordinances are one enacted on August 17, 1961, establishing residential limits of Impact, one enacted on September 21, 1961, entitled "An Ordinance Prohibiting the Sale of Beer, Wine, *(continued)*

At the time this suit was filed, three business establishments were licensed to sell alcoholic beverages on a retail, off-premises basis in Impact, including one owned by Dallas Perkins, one owned by Tom "Pinkie" Roden, and one owned by Pinkie's, Inc. The five-member City Council of Impact at that time included Dallas Perkins, his wife, his father, Dickie W. Maxwell (an employee of the liquor store owned by Pinkie's, Inc.), and Marion Teel (an employee of the liquor store owned by Tom "Pinkie" Roden). (R. 92). All of these persons are named as defendants in both their individual and official capacities.

Impact bears little resemblance to most other cities. Virtually all of its few commercial buildings are used in connection with the sale of alcoholic beverages; there are no public buildings, churches or schools. (Pet. 35). Whatever its shortcomings as a city, however, Impact has unquestionably been an effective device for the maintaining of a geographical retail liquor monopoly. Until 1978, the nearest location to Impact where alcoholic beverages were sold on a retail basis for off-premises consumption was approximately thirty-eight miles away. Not surprisingly, retail prices of liquor at the three outlets in Impact were significantly higher than in other locations. (R. 92). Although not reflected in the record, voters in the neighboring city of Abilene recently approved by a narrow margin the retail sale of alcoholic beverages in that municipality.

(footnote continued from preceding page)
Liquor or Other Intoxicating Beverages Within the Residential Limits of the City of Impact, Texas; and Providing a Penalty," and one enacted December 29, 1961, entitled "Zoning Ordinance for the City of Impact, Texas." (R. 115-16).

On June 16, 1975, the respondent, through his attorney, submitted to the petitioner Nancy Perkins, in her capacity as Secretary of the City of Impact, an Application for a Wine and Beer Retailer's Off-Premises License, which under Texas law must be signed by the City Secretary before being submitted by the applicant to the Texas Alcoholic Beverage Commission. (R. 116, 119). On July 1, 1975, Nancy Perkins responded, stating that because city ordinances prohibited the sale of alcoholic beverages on respondent's lot, where he planned to locate his business, she would not sign the application. (R. 116-17, 124). Because of Nancy Perkins' refusal to sign this application, the respondent is unable to engage in the business of the retail sale of alcoholic beverages in Impact. This action ensued, the respondent claiming, inter alia, that the enactment of the ordinances referred to previously and the refusal to sign his application constitute overt acts in furtherance of a conspiracy to restrain competition in the retail sale in Impact of alcoholic beverages for off-premises consumption. (R. 115-17).

On January 29, 1976, the District Court entered a summary judgment for the defendants on the ground that the City's valid zoning ordinance, under which the operation of a liquor business on plaintiff's property is prohibited, bars recovery regardless of whether defendants' actions otherwise violate the antitrust laws. (Pet. 37-40).

In September 1977, the United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court, holding that "[t]he mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the

plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade." (Pet. 24). In addressing the defendants' argument that their conduct was shielded from immunity by the so-called "state action" exemption to the antitrust laws, the court below distinguished *Parker v. Brown*, 317 U.S. 341 (1943), as follows:

> [T]hat case involved "no question of the state or its municipality becoming a participant in a private agreement or combination by others for the restraint of trade." 317 U.S. at 351-352, 63 S.Ct. at 314. That is the question here. (Pet. 27).

Following the Fifth Circuit's September 1977 decision the City and its fellow defendants petitioned this Court for a writ of certiorari. On April 24, 1978, in accordance with the treatment given several pending cases, the writ in this case was granted and the case was remanded to the Fifth Circuit "for further consideration in light of *City of LaFayette v. Louisiana Power and Light Co.*, [435 U.S. 389 (1978)]." 435 U.S. 992 (1978).

On July 17, 1978, the Fifth Circuit announced in a *per curiam* opinion that, in keeping with this Court's direction, it had reconsidered the case in light of the *City of LaFayette* decision. The Fifth Circuit ordered the remand of the case to the District Court for further proceedings consistent with its September 1977 opinion and that of this Court in *City of LaFayette*.

REASONS FOR DENYING THE PETITION

1. The Court of Appeals acted well within its discretion in reaching its decision on remand without requesting additional briefing or argument and in entering only a *per curiam* opinion.

Despite petitioners' attempts at pages 6-15 of the Petition to draw this Court into a full-dress review of the application of *City of LaFayette* to the pleadings and summary judgment proof in this case, the question actually presented for review is a much narrower one: Has the Court of Appeals complied with this Court's order to reconsider the September 1977 Fifth Circuit decision in light of *City of LaFayette*?

Petitioners' argument on this vital issue is essentially two-fold. First, while conceding that the Fifth Circuit "may very well have studied the delicate standards of *City of LaFayette* and applied them to this case," (Pet. 15), petitioners complain of the terseness of the Fifth Circuit's opinion and "suggest that, at a minimum, the Fifth Circuit should have explained its holding and its views of the *City of LaFayette* * * * * " (Pet. 16). Secondly, petitioners grouse about their not having been afforded an opportunity to present a brief on the "subtle changes introduced by *City of LaFayette*." (Pet. 15-16).

Clearly, the Fifth Circuit acted reasonably and within its discretion. The Court of Appeals was directed only to consider the effect, if any, of the *City of Lafayette* decision on its prior holding. It is submitted that Judge Tuttle and his fellow panelists were fully

capable of performing that task without the aid of additional briefing and argument by counsel.

As for the terseness of the Fifth Circuit's opinion on remand, it must be remembered (1) that the September 1977 Fifth Circuit opinion in this case relied heavily on that court's opinion in *City of LaFayette*, and (2) that the standard established by the Supreme Court plurality in *City of LaFayette* for deciding whether a city's anticompetitive conduct is exempted from the antitrust laws is precisely the same as that set forth in the Fifth Circuit's *City of LaFayette* opinion. In fact, in announcing its holding, the opinion of the plurality of this Court in *City of LaFayette* quoted directly from the Fifth Circuit's opinion in that case as follows:

> [W]e agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of." 532 F.2d, at 434.

435 U.S. at 415.

Since, in its September 1977 opinion in this case, the Fifth Circuit had already measured the pleadings and summary judgment proof by exactly the same yardstick later employed by the plurality in *City of LaFayette*, it should not be amazing that, on remand, the Fifth Circuit panel saw no overwhelming necessity to publish yet another elaborate opinion. In any event, the Court of Appeals clearly did not abuse its discretion in favoring brevity over redundancy.

2. The Fifth Circuit's decision to remand the case to the District Court does not conflict at all with *City of LaFayette* and other decisions of this Court.

Petitioners argue strenuously that on the basis of the five opinions filed in *City of LaFayette*, the Fifth Circuit was required to affirm the District Court's granting of a summary judgment for defendants. (Pet. 6-15). This argument overlooks entirely that plaintiff's pleadings below contain allegations that, at this point, must be accepted as true and that go well beyond the type of anticompetitive conduct claimed in *City of LaFayette*. Specifically, as the Fifth Circuit pointed out in its September 1977 opinion, "Plaintiff clearly alleges that the Defendants enacted the [zoning] ordinance for the express purpose of excluding him from the liquor business in violation of their conspiracy." 559 F.2d at 380. Like allegations are made respecting the passage of the City of Impact's liquor control ordinance and the refusal of the City Secretary to sign plaintiff's application for a license to sell alcoholic beverages. These allegations of a conspiracy by municipal officials with private parties place this case in a category different from that under consideration in *City of LaFayette*.

To understand the importance of the allegations in this case of a private conspiracy, it is necessary to return to this Court's decision in *Parker v. Brown*, 317 U.S. 541 (1943). In *Parker*, a private grape grower and packer challenged the administration by California officials of a legislatively mandated raisin marketing program which had anticompetitive effects. Assuming

for purposes of its decision that the program would violate the Sherman Act if conducted by private individuals, the Court nevertheless held the actions of the state officials to be outside the reach of the antitrust laws. The Court stated that there is

> nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

However, the Court expressly reserved for later decision the "question of the state or its municipality becoming a *participant* in a private agreement or combination by others for restraint of trade." 317 U.S. at 351-52 (Emphasis added). Further, the Court noted:

> The state in adopting and enforcing the prorate program made no contract or agreement and *entered into no conspiracy in restraint of trade or to establish monopoly*, but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. (Emphasis added).

317 U.S. at 352.

The suggestion of the Court in *Parker* that a contrary result would be indicated if allegations were made of participation by public officials in a private conspiracy has been borne out in later decisions of this Court.[2] In

[2]The lower courts have also held that public officials who participate in private schemes to violate the antitrust laws are thereby deprived of any state action immunity. See *Duke & Co., Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Herman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964) [also cited for the above proposition by this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 513 (1972)], *Windham v. American Brands, Inc.*, 1975-2 Trade Cases ¶60,530 (S.D.S.C. 1975); *Azzaro v. Town of Branford*, 1974-2 Trade Cases ¶75,337 (D.Conn. 1974); *Fox v. James B. Beam Distilling Co.*, 1974-2 Trade Cases ¶75,375 (S.D. Ind. 1974).

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Court found no governmental immunity where the complaint alleged that the defendant parent company had conspired with one of its subsidiaries, the officially appointed buying agent for an arm of the Canadian government, to prevent plaintiff's competing for the Canadian business. Later, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), the *Continental Ore* decision was cited for the proposition that "conspiracy with a licensing authority to eliminate a competitor may. . . result in an antitrust transgression."

Still more recently, the same principle was announced in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). In *Goldfarb,* consumers of legal services sued the Virginia State Bar, a state agency. They claimed that the Bar had violated the Sherman Act by issuing "suggested" minimum fee schedules which were adopted in substance by local bar associations, and by issuing ethical opinions enforcing the local fee schedules. The Court observed:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. Cf. *Gibson v. Berryhill*, 411 U.S. 567, 578-579 (1973). *The State Bar*, by providing that deviation from County Bar minimum fees may lead to disciplinary action, ***has voluntarily joined in what essentially is a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.*** (Emphasis added). (Footnote omitted).

421 U.S. at 792.

In short, this Court has consistently held that, whatever the usual antitrust liabilities of a public official, no immunity is offered when he undertakes to participate in a private conspiracy with others to violate the antitrust laws. The petitioners herein are alleged to have engaged in both their official and individual capacities in a private conspiracy for private gain and, accordingly, may be held accountable under the Sherman Act.

It is against the foregoing background that this Court's decision in *City of LaFayette* must be viewed. As Justice Blackmun observed in his dissenting opinion, the question of whether the *City of LaFayette* had acted in concert with private parties was before neither this Court nor the Court of Appeals in that case. 435 U.S. at 444. Moreover, as Justice Blackmun noted, "[t]o grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded to officials of the States themselves." *Id.* It is clear, accordingly, that nothing in any of the opinions filed in *City of LaFayette* would preclude a recovery by the plaintiff in this case, in which a conspiracy with private parties is alleged.

Apart from its consistency with the decisions of this Court respecting the liability of public officials who engage in private antitrust conspiracies, the Court of Appeals' holding is also totally compatible with other aspects of the various opinions filed in *City of LaFayette*. One factor that has always been carefully scrutinized by this Court in cases involving the *Parker* exemption has been the degree of involvement of the state acting as a sovereign. The above-quoted language from *Parker* makes clear that the Court regarded it as a

case in which the state legislature had itself mandated the anticompetitive conduct complained of. The *Parker* requirement that the anticompetitive conduct be mandated by the state has been repeatedly emphasized by this Court. See *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 790; *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 706 (1962) (referring to *Parker* as a case of "mandatory" state regulation and refusing to find governmental immunity where there was no evidence of express governmental approval of the conspiracy in which a defendant government agent allegedly participated); *Schweggman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (referring to *Parker* as a case in which "a state *compels* retailers to follow a parallel price policy and *demands* private conduct which the Sherman Act forbids") (Emphasis added).

The opinions of the plurality and of Chief Justice Burger in *City of LaFayette* clearly continue the longstanding requirement that anticompetitive conduct must be directed by the State in order to qualify for *Parker* protection. The plurality concluded, for example, that

> in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city can hardly be found to be pursuant to *"the state[s] command,"* or to be restraints that *"the state * * * as sovereign" imposed.* [Quoting *Parker*, 317 U.S. at 352] [Emphasis added].

435 U.S. at 414. The plurality went on to note that

> an adequate state *mandate* * * * exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [Quoting from the Fifth Circuit's opinion, 532 F.2d at 434] [Emphasis added].

Id. at 415. By footnote, however, the plurality stressed that they rejected "petitioners' fallback position that an antitrust claim will not lie for anticompetitive municipal action which, though not state-directed, is lawful under state law." *Id.* at 415, n. 45. Chief Justice Burger and Justice Marshall stated they would go somewhat further than Justices Brennan, Powell and Stevens and would require not only a State mandate, but also a showing that an antitrust exemption was essential to the State's regulatory scheme. See 435 U.S. at 417, 425-26.

By pointing out that their conduct complained of in this case "originates with" general State statutes granting cities the powers to zone and to regulate liquor sales, petitioners seek to show a sufficient State mandate for their alleged conspiracy to bar everyone other than the city fathers and their cohorts from the retial sale of alcoholic beverages in Impact. It should be obvious that, assuming the truth of the allegations of conspiracy, the Texas legislature could never have "contemplated" that the general zoning and liquor control laws would be so employed by city officials to stifle those who would dare to compete with them in their private capacities as business men and women.

The Fifth Circuit's decision not only comports with *City of LaFayette*, but is also consistent with this Court's other recent rulings in cases involving the "so-called state action exemption." *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 788. In *Goldfarb,* for

example, the requisite degree of state involvement was found lacking despite the statutory status of the State Bar as a state agency. There the Court stated:

> Although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondent's activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objectives of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be *compelled by direction of the State acting as a sovereign*. (Emphasis added).

421 U.S. at 792. Similarly, in this case, while all municipalities in Texas have been given statutory authority to regulate zoning and liquor sales, their activities in that connection—including, certainly, those of petitioners—are neither required by the State nor approved by it after the fact.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), a retail druggist sued a private utility claiming that it used its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. The utility furnished its residential customers, without additional charge, with almost fifty percent of the most frequently used light bulbs under a program approved, as part of its rate structure, by the Michigan

Public Services Commission. The practice could not be changed by the utility under state law without its filing, and the Commission's approving, a new tariff. Despite those facts, the Court held that the state action defense was not available.

While *Cantor* is not, perhaps, directly applicable to this case since it did not involve a suit against governmental officials, its teachings are important in two respects. First, a majority of the Court reiterated "that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." 428 U.S. at 592-93. Secondly, the Court held that the federal antitrust laws may be applied in areas of the economy pervasively regulated by the State. *Id.* at 595. In that connection, the majority observed that the regulated conduct would not necessarily be required thereby to satisfy inconsistent standards, and stated that "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's." *Id.* Thus, in the present case, the fact that the State of Texas may have authorized municipalities generally to regulate zoning and liquor matters cannot, of itself, insulate the petitioners from antitrust liability for their own conspiratorial acts.

The decision of the court below is consistent, too, with the holding of this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). There the Court noted that the challenged restraint—a prohibition against advertising by attorneys—was occasioned by "the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B)." 433 U.S. at 360. Since the Arizona

Supreme Court was "the ultimate body wielding the Stae's power over the practice of law" and "the real party in interest," the restraint was held to be, in the language of *Goldfarb*, "'Compelled by direction of the State acting as a sovereign.'" *Id.* at 360-61 (citation omitted). Moreover, the Court noted that the Arizona State Bar operated under the "continuous supervision" of the State's Supreme Court, *id.* at 361, and that "the rules are subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." *Id.* at 362. The Court concluded:

> Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

Id.

Despite petitioners' contention that the mere existence of Texas statutes authorizing municipalities to enact zoning ordinances and regulate liquor store locations brings this case within the sheltering ambit of *Bates*, it is clear that the two cases are distinguishable. First, unlike the State Bar in *Bates*, the municipality here is under no mandate from the State to impose the restraint in question. Secondly, whereas the Supreme Court of Arizona was continually provided with the opportunity to review in grievance cases the implementation of its mandate by the State Bar, here there is no occasion for the State of Texas to review the exercise by the City of Impact of its authority to regulate zoning and liquor matters. Finally, the record in the case at the

bar does not indicate the existence of any supervision by the State, whereas in *Bates* the "continuous" and "active" supervision provided by the Arizona Supreme Court was stressed repeatedly.

In summary, the decision of the court below is entirely consistent with the rulings of this Court concerning the state action immunity enjoyed by public officials in very limited circumstances. Accordingly, further review by this Court is unwarranted at the present time.

3. The decision of the court below does not conflict with decisions of other circuits concerning the standing required of plaintiffs in antitrust cases.

Employing a "Catch-22" brand of logic, the petitioners make much of the fact that the respondent did not purchase his lot in Impact until after the enactment of ordinances precluding the use of that lot for the retail sale of liquor. Respondent cannot have been "injured in his business or property,"[3] they reason, "because so long as the valid zoning ordinance prevents the sale of liquor at that location he cannot obtain the necessary license from the State." (Pet. 18-19). This argument overlooks that the respondent has alleged that the enactment of the zoning ordinance that precludes his entering the liquor business was itself an act in furtherance of the antitrust conspiracy of which he complains. Since it is the validity of that official action under the antitrust laws which is at issue in this case, it can hardly be said that the existence of that ordinance and the legal stumbling block it imposes can deprive

[3]See 15 U.S.C. §15.

the respondent of standing to make his antitrust challenge. The antitrust cases cited by petitioners, *see* Pet. at 19, are distinguishable because in those cases the impossibility of the plaintiffs' entering business was not occasioned by the challenged restraint, but by other circumstances.[4]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BY WILLIAM THOMAS JACKS

ATTORNEYS FOR RESPONDENT
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[4]In addition to the antitrust cases cited by the petitioners at page 19 of the Petition, the cases of *Clouser v. David*, 309 F.2d 233 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), and *C.F. Lytle Co. v. Clark*, 491 F.2d 834 (10th Cir. 1974), are cited and discussed in the Petition at pages 17-18. These cases, too, are distinguishable, because neither involves a situation where, as here, the enactment of the zoning ordinance was claimed to be an act in furtherance of a conspiracy to violate the antitrust laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-889

CITY OF IMPACT, DALLAS PERKINS, NANCY PERKINS his wife, R. L. PERKINS, DICKIE W. MAXWELL, MARION TEEL, IMPACT DEVELOPMENT CORP., TOM RODEN, and PINKIE'S, INC.,
Petitioners,

v.

EDGAR E. WHITWORTH,
d/b/a DINKIE'S FOOD MART,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

The Respondent seeks to minimize the significance for all municipalities of the issues presented by this petition by characterizing the City of Impact as having certain "shortcomings as a city." These aspersions are evidently based on the small size of the community and the nature of one of its principal businesses. However, the Supreme Court of Texas has twice upheld the validity and sovereignity of the City of Impact in spite of precisely such challenges. *Perkins v. Ingalsbee,* 347 S.W.2d 926 (Tex. 1961); *Perkins v. State,* 367 S.W.2d 140 (Tex. 1963).

The City of Impact, as the courts below correctly assumed, stands in no different legal position than any other validly chartered municipal government.

II.

The primary argument advanced by the Respondent in opposition to the petition is, in fact, a reason for granting the petition. The Respondent argues that the City of Impact has placed itself within the coverage of the antitrust laws by becoming a "participant in a private conspiracy," relying on this court's comment in *Parker v. Brown*, 317 U.S. 341, 351-52 (1943) that under the facts of that case there was "no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade." It was on this same passage that the court of appeals primarily relied in its first (and later re-adopted) opinion in this case. That court did not base its reversal of the trial court's judgment for Petitioners upon the state action issues decided by it, and later this Court, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Rather, the court below considered the mere allegation of "participation in a private conspiracy" sufficient to reverse the trial court judgment without reaching the questions under *Parker* and *City of Lafayette*. The holding by the Fifth Circuit underscores the significance of a primary undecided issue presented by this petition: the meaning of "participation in a private conspiracy" and the extent of its applicability to cities after *City of Lafayette*.

The Petitioners respectfully suggest that the issue whether a governmental body is a participant in a private

conspiracy (if indeed that is an issue) and the considerations elaborated upon by this Court in *City of Lafayette* are intertwined in such a manner as to deserve clarification by this Court. The threshold question, of course, is the viability of such a finding after *City of Lafayette*. In setting forth the extent to which cities may be liable under the Sherman Act, no plurality or concurring opinion in *City of Lafayette* addressed whether "participation in a private conspiracy" had any implications after that decision. Only Mr. Justice Blackmun, dissenting, made any reference to the concept and expressed the need for some clarification:

> The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all.

435 U.S. at 441. Nevertheless, the court of appeals in the instant case considered the concept of a "conspiracy with private parties" very much alive and would remand this case for consideration of whether the City of Impact's exercise of its zoning powers was a "bona fide governmental function." No effort was made by the court of appeals to relate it to *City of Lafayette* considerations. In particular, it is unclear whether the failure of a city to establish its entitlement to state immunity under *City of Lafayette* is one and the same as a finding that is participated in a private conspiracy. If they are different, their relationship is uncertain in light of *City of Lafayette's* silence on the issue. The Fifth Circuit's opinion indicates that *City of Lafayette* issues will be reached only if it is first determined that a city was not a partici-

pant in a private conspiracy. Under this analysis, it would be possible for city action to be immune under *City of Lafayette* standards yet still liable under a "conspiracy with private parties" theory.

If a finding of participation in a private conspiracy does strip a city's actions of immunity without regard to *City of Lafayette* considerations, it is unclear what would constitute such participation. While the Petitioners can understand judicial refusal to afford antitrust immunity to an individual who seeks to cloak his private acts as the acts of the government or to a governmental body which enters what essentially is the private sector, the instant case presents no such facts. Every act alleged to have caused the Respondent injury was an official and uniquely government act of the City of Impact. There was no notification or participation by the City in a private agreement "by others" to restrain trade. *Parker v. Brown, supra,* 317 U.S. at 352. To permit the official zoning acts of the city government to become a basis of antitrust liability would effectively impose liability for every municipal decision which happened to favor the interests of some citizens to the disadvantage of others. If, under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), there is no antitrust liability for individuals who, with anti-competitive intent, concertedly lobby a governmental unit for certain official action, the success of that immune activity should not result in liability for a city under the theory that it participated in a private agreement to restrain trade. If "participation in a private conspiracy" has any meaning after *City of Lafayette,* the instant

petition presents this Court with an opportunity to decide at what point a city's acts become participation in a private agreement.

III.

Whatever the significance and meaning of "participation in a private conspiracy," the instant petition also presents an important and unanswered question relating to the application of *City of Lafayette* standards. In particular, what direction is required by a state in order for its cities to be entitled to the same protection from antitrust review as the state itself? The Respondent would apparently require, as a condition of immunity, that the State of Texas enact special legislation acknowledging the particular action taken by the City of Impact and its effects. If such special legislation is required to insulate each governmental act of a city, then the fifty state legislatures will become super-city governments, reversing a policy to commit local matters to local discretion. The City of Impact engaged in the uniquely sovereign function of zoning pursuant to a detailed state plan for liquor regulation and local zoning as a part of such state regulation. Under that statutory plan, described in the petition, there could be no clearer indication of state direction to the City of Impact without the legislature actually determining the zoning of each lot. From the authority granted the City of Impact in the "area" of zoning and liquor regulation, the State of Texas has clearly "contemplated the kind of action complained." *City of Lafayette,* 435 U.S. at 415. Like the Arizona Supreme Court in *Bates v. State Bar of Arizona,* 433 U.S. 350, 362 (1977), the State of Texas

has "clearly and affirmatively expressed" state policy. Indeed the injury results from the State's refusal to grant liquor licenses contrary to local zoning regulation.

To permit, as would the court of appeals, the Respondent to continue his action in the face of the State's articulated plan for liquor regulation and zoning, understandably raises grave doubts among the nation's cities as to what type of state mandate is required after *City of Lafayette* in order to protect the exercise of their governmental functions. If special legislation is required to insulate cities from liability, they and the legislatures need to be so told. This petition provides the Court with the means to resolve these concerns.

IV.

The Respondent has also emphasized the significance of another issue—whether by merely alleging a conspiracy between a governmental body and private parties, he may avoid the normal requirement of standing under Section 4 of the Clayton Act, 15 U.S.C. § 15, that the plaintiff be "injured in his business or property by reason of anything forbidden in the antitrust laws." The Respondent could not and cannot enter the liquor business on his property because in 1961, before its purchase by the Respondent, the lot was zoned residential and State law will not permit the issuance of a liquor license for a location so zoned. TEXAS LIQUOR CONTROL ACT, V.A.T.S. Penal Auxiliary Laws, Art. 666-24, 667-10 ½. The Respondent has not been injured in his "business or property" because these unchallenged state statutes and the valid act of city government prohibit his entry into the business alleged to have been injured.

The Respondent's attempt to characterize the Petitioner's argument as "Catch-22" is meritless because of the conceded validity of the zoning ordinance. Although he never sought a zoning variance or pursued any other remedies under state law, the Respondent's Original Complaint did, in addition to his antitrust allegations, contain a challenge to the ordinance under state statutory and constitutional law and federal constitutional law. However, in granting summary relief for the Petitioner, the district court held the ordinance to be valid. This holding was not challenged by the Respondent on appeal and the court of appeals assumed the ordinance's validity. Therefore, even if it were established that the Petitioner violated the antitrust laws as alleged, the zoning ordinance would remain valid and state law would continue to prohibit the Respondent from ever obtaining a liquor license for his residential lot until he chooses to seek and successfully obtain a zoning change through local procedures.

By permitting the Respondent to maintain an action for injury to a non-existent business, and one which can never come into existence by reason of state law, the court of appeals has redefined the concepts of causation

and injury to "business or property" in a manner requiring consideration by this Court.

Respectfully submitted,

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